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In The

Supreme Court of the United States

October Term, 1997

DAVID W. CHILDRESS, AUGUSTUS G. HARVEY, III, VINCENT J. MATASSA, HENRY W. MEASE, HOWARD S. NOYES, DANIEL G. QUINNEY, FLORIAN E. STACHURA,

Petitioners,

vs.

CITY OF RICHMOND, VIRGINIA; JERRY A. OLIVER, Chief of Police of the City of Richmond, Virginia, in his official capacity as Chief of Police of the City of Richmond; and MARTY M. TAPSCOTT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

This petition is filed seeking reversal of the dismissal of petitioners' Title VII racially and sexually hostile environment claims, dismissal of their Title VII claim of retaliation for filing a charge with the Equal Employment Opportunity Commission (EEOC), and dismissal of their Title VII claim of retaliation for opposing prohibited practices. As detailed below, there is no cause for this Court's review of the dismissal of these claims.

A. Petitioners have misrepresented the nature of the charges they filed with the EEOC.

On page 3 of the Petition, petitioners state, "During the following March and April, each of the officers filed a hostile-environment charge (race and sex) with the EEOC." Although technically correct, that statement is substantively misleading. Each petitioner is a white male who filed an initial charge of discrimination with the EEOC alleging he was harassed and subjected to a sexually and racially hostile environment **because of "*my* race, White and sex, male".**

Each, except petitioner Quinney, subsequently filed a charge of retaliation with the EEOC claiming acts of retaliation for having filed his previous charge of discrimination with the EEOC. The petitioners filed no other charges with the EEOC.

B. Petitioners have misrepresented the basis on which Judge Luttig determined that they were not aggrieved within the meaning of Title VII.

On page 7 of the Petition for Writ of Certiorari, petitioners state,

> Judge Luttig reached this conclusion [that petitioners lacked standing under Title VII] on the basis that

> Title VIII formally defines the term "aggrieved person" . . . under the general heading "Definitions", whereas in Title VII, which uses the term "aggrieved person" that term is not formally defined . . .

This is a misleading characterization of Judge Luttig's analysis. In his concurring opinion, Judge Luttig reasons that because Title VII does not define "aggrieved person", Congress intended the phrase to be interpreted as a term of art, which requires the application of prudential principles of standing which, in turn, requires a party to assert his own rights as a basis for relief. Applying prudential standards to this case, Judge Luttig concluded that petitioners did not have standing to pursue this action under Title VII because they were asserting the rights of others. (App. 52a-53a).

REASONS FOR DENYING THE WRIT

1. The petition for a writ of certiorari should be denied because although petitioners, all white males, filed a charge of discrimination with the EEOC complaining that they were discriminated against because of their race and their sex, the Amended Complaint contains no allegations from which one can reasonably infer that the conduct of which they complain constituted discrimination against them because of their race and sex.

Each of the petitioners filed charges of discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging he was subjected to a sexually and racially hostile environment because of "my race, White and sex, male".[1] However, all of the allegations forming the basis for the charge consisted of disparaging remarks about blacks and women.

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1. *See* Joint Appendix, pp. 100, 112, 133, 160, 164, 169 and 175.

The following statements of Lieutenant Arthur Carroll form the basis for petitioners' Title VII race and sex discrimination claims: (1) In November or December 1993 Carroll said, "Well, I see all my bitches (or ladies) are here, it must not be that time of the month". (Jt. App. 60); (2) On January 3, 1994, Carroll referred to female officers as the "pussy posse" and "vaginal vigilantes". (Jt. App. 60); (3) On December 16, 1993, Carroll stated that what was different about that particular day was that no black or female officers were present, and this was "like it used to be". (Jt. App. 58); and (4) Some time in early 1994, the wife of the of the plaintiffs telephoned the precinct and allegedly overheard Carroll saying, "[m]other fucking worthless black bitch", "no good black bitch", and "most useless nigger". (Jt. App. 60-61). Carroll made no additional comments of this nature. All of the remarks, except (4), were made during roll call.

The foregoing allegations do not make out a claim for unfavorable treatment because of the race or sex of the seven white male petitioners, and the Amended Complaint was properly dismissed.

2. The petition for a writ of certiorari should be denied because the conduct alleged as forming the basis for petitioners' race and sex discrimination claims under Title VII consists of the mere utterance of epithets and did not create an objectively hostile environment.

To establish a sexually hostile environment claim, petitioners must show the harassment was unwelcome, it was based on their sex, it was sufficiently severe or pervasive to create an abusive working environment, and the employer had actual or constructive knowledge of the hostile environment but took no prompt or adequate remedial action. *Spicer v. Commonwealth*, 66 F.3d 705, 710 (4th Cir. Va. 1995). The mere utterance of an

epithet which generates offensive feelings is not sufficient. If the conduct complained of is not severe or pervasive enough to create an environment that a reasonable person would find hostile or abusive, Title VII is not implicated. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993), *citing Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986). In determining whether an environment is hostile or abusive, one must consider all the circumstances, including, but not limited to, the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. *Id.* at 22. An environment that a reasonable person would find hostile or abusive is a "crucial" prerequisite to establishing a hostile environment case under Title VII. *Oncale*, 118 S. Ct. 1003. The same analysis is used to determine the existence of a racially hostile environment. *Dennis v. County of Fairfax*, 55 F.3d 151, 155-56 (4th Cir. 1995).

First, the boorish and disparaging remarks in (1) and (2) above were not directed at the male plaintiffs, but were obviously directed at females. The remark in (3) although possibly directed at the male plaintiffs, consists of a mere observation, and is obviously not objectively offensive, and the remark in (4) was not said in the presence of or directed at any male or female officer whatsoever. Moreover, these remarks are mere epithets and clearly isolated incidents which fall far short of the requirements of *Harris* for establishing a hostile environment case under Title VII. Further, after extensive discovery and the opportunity to produce evidence in response to respondents' motions for summary judgment, with respect to their racially hostile environment claim, petitioners did not present any evidence that any black officer was even aware of the comments in (3) and (4) above.

Additionally, assuming, *arguendo*, that each of the remarks was brought to the precinct captain's attention (Carroll's supervisor) on January 20, 1994, petitioners made no allegations in their Amended Complaint and produced no evidence that Carroll continued to make such remarks after January 20th. In fact, petitioners admitted that once their complaints were brought to the captain's attention on January 20th, no further remarks or outbursts of temper occurred.[2]

Although petitioners alleged in the Amended Complaint that the conditions of their employment were adversely affected by the loss of camaraderie and teamwork due to Carroll's remarks, their performance obviously did not suffer, as they received numerous commendations and awards and received either standard, above-standard, or exceeds standards on their performance evaluations.[3] Obviously, whatever workplace

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2. Petitioners admitted that prior to making the remarks alleged in the Amended Complaint, Carroll had not made similar remarks or engaged in conduct indicative of a sexually hostile environment. *See* Record, Exhibit 10 to Defendants' Memorandum in Support of Motion for Summary Judgment, specifically, each petitioner's answer to interrogatory 5. After Hicks was presented with the January 13th letter, Carroll's outbursts of temper and profanity ceased, *See* Record, Harvey Deposition, p. 70, and Carroll did not make any remarks similar to those alleged in the Amended Complaint. *See* Record, Childress Deposition, p. 55; Matassa Dep., p. 34; Mease Dep., pp. 115-116; Noyes Dep., p. 24; Quinney Dep., p. 32.

3. From January 21 to July 15, 1994, Noyes received five commendations for his work, Childress received one on January 14, 1994, Quinney received five from February 18 to July 1, 1994, Stachura received the Excellent Police Duty award on May 29, 1994, and from December 31, 1993 to June 18, 1994, Matassa received three commendations, including a Meritorious Police Duty award. Matassa was also Officer of the Month for August 1994. All petitioners were rated "above standards" on their 1993-94 performance evaluations, except Childress, who was rated "standard", Harvey, who was not evaluated, and Mease, who was rated "exceeds standards". For documentation, *See* Record, Defendants' Motion for Summary Judgment, dated February 27, 1996, p. 17.

atmosphere Carroll's remarks created did not unreasonably interfere with their work performance.

The *Harris* criteria for establishing a hostile work environment were not met in this case, and review by this Court of the dismissal of this claim is not warranted.

3. The decision of the court below in affirming the dismissal of petitioners' Title VII claims was correct because to permit white males to state a claim for relief under 42 U.S.C. § 2000e-2(a)(1), when the discriminatory conduct complained of is directed at blacks or females, ignores the plain causation language of Title VII.

Petitioners claim that their rights under § 2000e-2 of Title VII were violated. Title VII imposes liability for engaging in "unlawful employment practices" and provides, *inter alia*, that

> It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, **because of** *such individual's* **race, color, religion, sex, or national origin**; . . .

42 U.S.C. 2000e-2(a)(1) (emphasis added). Respondent contends that this causation language determines who may file suit under Title VII.

This Court has said that the

> first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular

> dispute in the case. [The] inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent.

Robinson v. Shell Oil Company, 519 U.S. 337, 344 (1997). The phrase "because of such individual's race" (or sex) is plain and unambiguous in a coherent statutory scheme. Section 2000e-2 describes five instances of prohibited employment practices "because of such individual's race, color, religion, sex or national origin." *See* 42 U.S.C. §§ 2000e-2(a)(1), 2000e-2(a)(2), 2000e-2(b), 2000e-2(c)(1) and 2000e-2(c)(2). Another portion of the prohibited practices section describes one additional prohibited employment practice by using the phrase "discriminate against **any individual** because of **his** race, color, religion, sex, or national origin. . . ." 42 U.S.C. § 2000e-2(d) (emphasis added). The statutory scheme is obviously consistent in prohibiting discriminatory practices which occur because of the race, color, religion, sex or national origin of the person alleging discrimination and evinces a clear Congressional intent that the discrimination be personal to the individual claiming it. Further, the phrases "to discriminate against any individual . . . because of such individual's race" (or sex) and "discriminate against any individual because of his race" (or sex) could not be plainer. Logically, then, the intent of the statute is served by providing a remedy to those who are the objects of the prohibited practices.

By conferring upon white males the right to file suit essentially alleging that they have been discriminated against because of conduct directed at blacks or females, the "critical causation language"[4] of Title VII will have been effectively re-written to prohibit discrimination "against any individual . . . because of such individual's, or anyone else's, race" (or sex).

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4. *McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191, 1195 (4th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 72 (1996).

Allowing the petitioners to assert their hostile environment claims under Title VII when the discriminatory conduct is directed at blacks or females is inconsistent with rulings of this court which either directly or implicitly have recognized the language of § 2000e-2(a)(1) to require that to be actionable the discrimination in harassment cases occur because of the complaining party's race or sex. *See Oncale v. Sundowner Offshore Services, Inc.*, __ U.S. __, 118 S. Ct. 998, 1002-03 (1998) ("plaintiff must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted discrimina[tion] . . . because of . . . sex") (Justice Thomas, concurring, ". . . the plaintiff must plead and ultimately prove Title VII's statutory requirement that there be discrimination 'because of . . . sex' "); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 25 (1993) ("The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.").

4. The petition for a writ of certiorari should not be granted because petitioners do not meet the requirements of Article III standing, and the Court has no jurisdiction under Title VII. Addressing the issue of standing requires an analysis of both constitutional and prudential limitations on federal court jurisdiction. This Court recently addressed these limitations in *Bennett v. Spear*, __ U.S. __, 117 S. Ct. 1154, 1161 (1996). To meet Article III requirements,

> a plaintiff must, generally speaking, demonstrate that he has suffered "injury in fact", that the injury is "fairly traceable" to the actions of the defendant, and that the injury will likely be redressed by a favorable decision.

Id. at 1163.

Prudential principles guiding the courts include a general prohibition against third-party standing, that is, one "must generally assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975); *see also Valley Forge College v. Americans United For Separation of Church and State*, 454 U.S. 464, 474 (1982). Another requirement is that a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit. Although the "zone of interests" test has been largely applied to suits under the APA, it has been applied to other types of cases which did not involve review of federal administrative action, as well, and varies according to the provisions of law under consideration. *Bennett*, 117 S. Ct. 1161. Further, whether a litigant's interest is

> arguably . . . protected . . . by the statute within the meaning of the zone-of-interests test is to be determined not by reference to the overall purpose of the Act in question . . . but by reference to the particular provision of law upon which the plaintiff relies . . . The plaintiff must establish that the injury he complains of . . . falls within the "zone of interests" sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.

Id. at 1167 (internal quotation marks omitted).

"Congress legislates against the background of our prudential standing doctrine, which applies unless it is expressly negated." *Id.* at 1162. The question, then, is whether Congress intended to confer upon one who is not a direct victim of discrimination the right to file suit under Title VII.

Petitioners rely on *Trafficante v. Metropolitan Life Insurance Company*, 409 U.S. 205 (1972), in support of their contention that they have standing to pursue a racially and sexually hostile environment claim under Title VII when the basis for their claim is discrimination against others and not themselves. In *Trafficante*, this Court was faced with the question of whether a white person was entitled to sue under § 810 of the Civil Rights Act of 1968 (Fair Housing Act) although blacks were the objects of the discrimination alleged. In addressing that question, this Court examined the language of § 810(a), which provides, *inter alia*, that "[a]ny person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur (hereafter 'person aggrieved') may file a complaint with the Secretary", 42 U.S.C. § 3610(a), and found it to be "broad and inclusive".[5] *Trafficante*, 409 U.S. at 209. This Court also noted that

> "[w]hile members of minority groups were damaged the most from discrimination in housing practices, the proponents of the legislation emphasized that those who were not the direct objects of discrimination had an interest in ensuring fair housing, as they too suffered.

Id. at 210. This Court's holding in *Trafficante* permitted a white person to sue based on discrimination against blacks under Title VIII.

The petitioners' reliance on *Trafficante* as permitting white males to sue for discrimination against females or blacks under

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5. In describing prohibited practices, Title VIII contains four references to discrimination "because of race, color, religion, sex, handicap, familial status, or national origin". Title VIII does not use the language "because of such individual's race".

Title VII is based in significant part on the fact that in its analysis of Title III, this Court cited with approval *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442 (3rd Cir. 1971), a Title VII case which addressed the phrase "person claiming to be aggrieved". *See Trafficante*, 409 U.S. at 209. While it is true that in *Hackett* the Court of Appeals concluded that the language "a person claiming to be aggrieved" shows a congressional intention to define standing as broadly as is permitted by Article III of the Constitution, *Hackett*, 445 F.2d at 446, it is important to note that in *Hackett* the plaintiff was alleging discrimination personal to him and that the question of standing the Court of Appeals answered was whether the plaintiff had standing **as a pensioner** to sue for direct discrimination under Title VII.[6] The Court of Appeals concluded that Hackett satisfied the requirements for Article III standing and could assert his claim of direct discrimination.

The mere fact that Article III standing exists with respect to a plaintiff claiming direct discrimination does not mean that Article III standing should be found with respect to the petitioners in the instant case, and it does not mean that anyone can allege a violation of civil rights not personal to them in order to effectuate the purposes of Title VII. If the citing of *Hackett* in *Trafficante* is a resounding endorsement of anything, it is an endorsement of the proposition that a person claiming direct discrimination can sue under Title VII for redress provided he can meet the requirements for Article III standing. As indicated above in section 3, the critical causation language of the Title VII provisions describing prohibited practices is a clear

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6. The district court dismissed Hackett's suit on the basis that as a pensioner, he was not an employee within the meaning of Title VII. *Hackett*, 445 F.2d at 445. In concluding that a pensioner was indeed entitled to sue under Title VII, the Court of Appeals found that the "person claiming to be aggrieved" language in Title VII showed a congressional intent to define standing as broadly as Article III permits. *Id.* at 446.

indication of an intent to make the discrimination actionable under Title VII personal to the individual claiming it. Further, prudential standing principles were specifically negated in *Trafficante* with respect to Title VIII when Congress used the "any person" language indicating an intent to give the broadest possible range of individuals a right to sue to enforce Title VIII.

Additionally, unlike Title VIII, which did not provide an administrative agency with enforcement powers, Title VII provides an administrative agency with broad enforcement powers to administer Title VII. So while the need for "private attorneys general" to enforce Title VIII is glaring, the lack of such a need for the enforcement of Title VII is equally apparent by virtue of the existence of the EEOC.

Petitioners suffered no distinct and palpable injury, but rather complain of being the beneficiaries of favorable treatment that was not alleged to deprive them of the benefits of interracial or intergender relations with their fellow black or female officers. If females or blacks are the direct victims of the discrimination, males and whites are the indirect beneficiaries. If whites and males are the indirect beneficiaries of the discrimination, to allow petitioners to sue and benefit again from being in a favored employment status does nothing to serve the purposes of Title VII. Petitioners have not been injured by being the beneficiaries of better treatment than their coworkers.

Petitioners allege that Carroll's remarks interfered with "teamwork", but nowhere have they alleged, and extensive discovery produced no evidence whatsoever, that white officers refused to work with black officers, that black officers refused to work with white officers, that female officers refused to work with male officers or that male officers refused to work with female officers.

5. The petition should be denied because petitioners are not persons claiming to be aggrieved within the meaning of Title VII. Although the term "person aggrieved" is specifically defined in the Fair Housing Act, the phrase "a person claiming to be aggrieved" is not specifically defined in Title VII. As Circuit Judge Luttig observes in his concurring opinion,

> [i]n the law, the phrase "aggrieved person" has long been a "term of art" ordinarily understood to mean those persons who could satisfy both prudential and constitutional standing limitations.

Childress v. City of Richmond, 134 F.3d 1205, 1208 (4th Cir. 1998), *citing Director, OWCP v. Newport News*, 514 U.S. at 125 (1995) (Luttig, J., concurring). "Congress legislates against the background of our prudential standing doctrine, which applies unless it is expressly negated." *Bennett*, 117 S. Ct. 1162. If it chooses to do so, Congress may override prudential standing limitations and authorize all persons who satisfy Article III requirements to bring a particular lawsuit in federal court, such as it did with the Fair Housing Act.

> But where it has not done so, and instead has simply invoked the term of art "aggrieved person", the default rule generally is that Congress has created a cause of action only for those persons who can satisfy both types of standing requirements — constitutional and prudential.

Childress, 134 F.3d 1209. The prudential rule against standing requires that a party assert his own statutory rights and not those of third parties. Applying this analysis to Title VII, the prudential rule against third-party standing requires the petitioners herein to assert only those rights Title VII confers upon them, which are to be determined from examining the practices this statute prohibits.

Petitioners filed their Title VII claim alleging that respondents violated § 2000-e of Title VII, which describes unlawful employment practices. As noted above, the causation language contained in § 2000-e, "because of such individual's race, color, religion, sex, or national origin", requires a showing that the discrimination occurred because of the complaining party's race, color, religion, sex or national origin.

Additionally, notwithstanding the general similarity of purpose served by both the Fair Housing Act and Title VII — the eradication of discrimination — the language contained in Title VII shows an intent to protect direct victims of discrimination. Although the loss of important benefits of interracial associations can apply with equal force in either a housing or an employment discrimination case, employment discrimination involves consequences to the victim that are far more personal and that can have a far more devastating personal effect. In an employment case, the loss of a job and corresponding loss of income to an individual, the loss of a promotion, loss of status, denial of opportunities for upward mobility, the loss of pay, loss of benefits, the imposition of disciplinary action can have a profoundly negative effect on the individual experiencing them.

Moreover, before the statute was amended in 1991 to allow recovery of compensatory damages, the remedies under Title VII, which include reinstatement or hiring of employees, back pay, front pay, *inter alia,* are appropriate to victims of direct discrimination, and would never be appropriate to a beneficiary of discrimination because such a person would already be in a favored status with respect to those items. The original intent of the statute could not have been to allow persons to assert the rights of others, as the statute provided no compensation to those who did not suffer a job detriment. Petitioners have not noted anything that would support a change in this intent in the Civil Rights Act of 1991 or anywhere else.

6. The petition should not be granted with respect to petitioners' opposition retaliation claim because the trial court was without jurisdiction to hear it, because it was time-barred, and because petitioners suffered no adverse employment action.

Title VII prohibits an employer from retaliating against individuals for opposing unlawful practices or for participating in investigations, proceedings, or hearings in connection with claims of discrimination.

> It shall be an unlawful employment practice for an employer to discriminate against any individual . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 20006-3(a).

To establish a *prima facie* case of retaliation, one must show

> 1) the employee engaged in protected activity; 2) the employer took adverse employment action against the employee; and 3) a causal connection existed between the protected activity and the adverse action.

Balazs v. Liebenthal, 32 F.3d 151, 158 (4th Cir. 1994); *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 365 (4th Cir. 1985). Once a *prima facie* case is established, a presumption of retaliation arises, which the employer may rebut. The employee may then show that the employer's explanation is pretextual. *Id.* at 365. The filing of a formal EEOC charge is not always required. However, allegations contained in an administrative

charge of discrimination generally operate to limit the scope of a subsequent judicial complaint.

> Only those discrimination claims stated in the initial charge, those reasonably related to the original complaint, and those developed by reasonable investigation of the original complaint may be maintained in a subsequent Title VII lawsuit.

Evans v. Technologies Applications & Serv. Co., 80 F.3d 954, 962-63 (4th Cir. 1996). When a formal charge of retaliation is not made with the EEOC, the employee must allege that he informed the EEOC that he was retaliated against for opposing unlawful practices. *Johnson v. General Elec.*, 840 F.2d 132, 139 (1st Cir. 1988). When claiming retaliation for opposition to a practice made unlawful by Title VII, an employee must have an objectively reasonable belief in the validity of the underlying charge. *See Gifford v. Atchinson, Topeka and Santa Fe Ry. Co.*, 685 F.2d 1149, 1156-57 (9th Cir. 1982); *Sisco v. J.S. Alberici Constr. Co.*, 655 F.2d 146, 150 (8th Cir. 1981), *cert. denied*, 455 U.S. 976 (1982). Adverse employment actions pertain to "ultimate employment decisions" including "hiring, granting leave, discharging, promoting and compensating." *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981), *cert. denied*, 454 U.S. 892 (1981). *See also Rabinovitz v. Pena*, 89 F.3d 482 (7th Cir. 1996) ("a materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities"). A negative comment in an employee's performance evaluation does not constitute adverse employment action *See Hopkins v. Baltimore Gas and Elec. Co.*, 77 F.3d 745, 755 (4th Cir. 1996).

Petitioners alleged that respondents retaliated against them for assisting two female officers with their complaints of discrimination and for opposing discriminatory practices. This

opposition-retaliation claim was never presented to the EEOC and was raised for the first time in the Amended Complaint, which was filed with the trial court on December 8, 1995.

The trial court examined the "male officers' charge-filing forms, and the affidavits to the EEOC in the plaintiff's summary judgment exhibit entitled "PLAINTIFFS' EEOC RETALIATION CHARGES" and concluded that those items "nowhere mention this new theory."[7] The trial court, therefore, made a specific factual finding that the opposition-retaliation claim of petitioners was never presented to the EEOC. The petitioners have not challenged this factual finding. Further, petitioners did not allege in their Amended Complaint that they had informed the EEOC of their claim of retaliation for assisting the females in opposing discrimination.

Petitioners variously claimed that respondents retaliated against them by giving them negative ratings on their performance evaluations, by denying time off, by counseling one of them about working unnecessary overtime, or by changing their assignments. Not only were these claims either unsupported by any evidence or done for legitimate reasons[8], but they also did not involve "adverse employment action" within the meaning of Title VII.

7. The writ should not be granted with respect to petitioners' participation-retaliation claim because they have failed to present any reason why the award of summary judgment to respondents was improper and because they suffered no adverse employment action. Petitioners' participation-retaliation claims are based on their allegation that the respondents retaliated against them for

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7. *See* Appendix to Petition for Writ of Certiorari, p. 20a.

8. For a detailed discussion of each claim of retaliation, please refer to Appendix, p. 1a-8a.

filing their initial EEOC charge. The court below affirmed the trial court's award of summary judgment to respondents on the basis that petitioners failed to produce any evidence that any of the retaliation claimed was motivated by the filing of their EEOC charges. The petitioners have not seriously challenged the trial court's conclusion on this point. They only state on page 18 of their Petition for Writ of Certiorari, "[t]he record in the Fourth Circuit Court of Appeals shows otherwise. (*See, e.g.*, App. 61a-62a)." These two cited pages of the appendix consist of an excerpt from the deposition testimony of Lieutenant Arthur T. Carroll, who expressed his opinion about the involvement of petitioners Childress, Mease and Harvey. This excerpt standing alone falls far short of evidence showing that the filing of their original EEOC charges was the motivation for any retaliation petitioners claimed. Additionally, as stated above in connection with the discussion of the opposition-retaliation claims, none of the acts claimed as retaliation constituted adverse employment action. Consequently, the retaliation claims were properly dismissed.

8. The petition should be denied because the decision of the court below does not conflict with decisions of this Court and those of other Courts of Appeals. With respect to the Title VII claims, including the retaliation claims, the court below affirmed the decision of the district court by an *en banc per curiam* decision of an equally divided court. Opinions which are affirmed by an equally divided *en banc* Court of Appeals have no precedential value. *Nichols v. United States*, 511 U.S. 738, 750 (1994); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 759 (1984), *rehearing denied*, 466 U.S. 994 (1984). Because the decision of the court below created no precedent, any conflict is merely illusory, and petitioners have cited no other opinions of any court indicating a conflict exists.

CONCLUSION

For the reasons given above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A — EXCERPTS FROM BRIEF OF APPELLEES, *CHILDRESS, et al. v. CITY OF RICHMOND, et al.*, RECORD NO. 96-1585, DATED SEPTEMBER 9, 1997

[Commencing at page 20]

to these claims, then dismissal on summary judgment was appropriate. To prevail on a retaliation claim plaintiffs must show they engaged in protected activity, they suffered adverse employment action, and there was a causal connection between the protected activity and the adverse action. *Balazs v. Leibenthal,* 32 F. 3d. 151, 159 (4th Cir. 1994). The fact that alleged retaliatory conduct occurs after an employee engages in protected activity may be sufficient to establish a causal connection between the protected activity and such conduct. However, an employer's mere knowledge that an employee has engaged in protected activity is insufficient to counter substantial evidence of legitimate reasons for the adverse action. *Williams v. Cerberonics, Inc.*, 871 F. 2d 452, 457 (4th Cir. 1989). Adverse employment action pertains to "ultimate employment decisions" including "hiring, granting leave, discharging, promoting and compensating." *Page v. Bolger,* 645 F. 2d 227, 233 (4th Cir. 1981), *cert. denied,* 454 U.S. 892 (1981).

The evidence in this case clearly shows that plaintiffs engaged in protected activity by filing their EEOC complaints. However, the evidence fails to show they suffered any adverse employment action, and in any event, the unrebutted evidence clearly showed that the city had legitimate, non-pretextual reasons for taking the actions it did.

Plaintiffs Matassa, Noyes, Quinney, Stachura and Childress claim retaliation with respect to their 1994 performance evaluations. Specifically, Matassa claims retaliation because he [21] received a "standard" rating on his evaluation although his total point score was 416.5, which should have resulted in an

"above standard" overall rating. However, the City provided evidence that Sgt. David McCoy originally rated Matassa "standard" notwithstanding his numerical score because Matassa had received two days of suspension during this evaluation cycle and believed this rating was required by City policies. However, Matassa's original evaluation was returned by the departments' Administrative Services Operation for correction, and McCoy subsequently recommended that Matassa receive an "above-standard" rating, and the "standard" overall rating was removed from Matassa's evaluation. (See Record, Exhibit A attached to Defendants' Reply Brief, dated March 14, 1996). This claim fails for failure to show adverse employment action.

Matassa also claimed retaliation because Carroll told him in July 1994 that he could have Christmas Day off, but failed to schedule him off on that day. Matassa filed a grievance and met with his immediate supervisor, Sgt. Leslie Stone, who denied the grievance because he felt Carroll had complete authority to schedule time off (except vacation) as he saw fit. Stone also concluded that Matassa's claims of retaliation for going to the EEOC were without merit because he had not personally observed that Carroll had singled anyone out for retaliatory reasons. (See Record, Exhibit B attached to Defendants' Reply Brief, dated March 14, 1996). Matassa pursued his grievance further, and was subsequently advised he could have Christmas Day off. (See Record, [22] Exhibit C attached to Defendants' Reply Brief, dated March 14, 1996). This retaliation claim fails, too, because Matassa can show no adverse employment action in as much as this situation was effectively remedied throughout the City's grievance procedure.

Plaintiff Noyes claims retaliation because he was counseled upon his supervisor and fellow plaintiff Harvey's

recommendation[3] for not taking his "EDO" (extra day off) in violation of a Police Department rule, which resulted in the City having to pay him unnecessary overtime. He admitted he did not take his EDO, that he received overtime pay as a result of failing to take the day off, and that he was counseled, but not disciplined, in connection with this infraction. (See Record, Noyes Deposition, P. 48). Noyes merely counseled and suffered no adverse employment action. Further, the fact that the recommendation for counseling came from his fellow plaintiff indicates it was not done for retaliatory reasons. The City's right to discourage employees from creating unnecessary overtime costs is clearly a legitimate reason to counsel Noyes, particularly when he was aware of the police department's policy regarding the same. This retaliation claim fails because there was no adverse employment action and because the uncontroverted evidence shows a legitimate reason for counseling Noyes.

Noyes also claimed retaliation because the comment ". . . during this rating period his actions have undermined the actions [23] of supervisors." (Jt. App. 186). Noyes' retaliation claims must fail. Other officers who signed the January 13th memorandum and participated in related events, but who did not file EEOC charges, received the same notations on their performance evaluations. (Jt. App. 241, 246, 248.)

Additionally, Noyes presented no evidence that he suffered any adverse impact from his comment being in his evaluation. No promotional examinations were given, and even if they had been, only the overall numerical rating, not individual comments, are reviewed when an officer is considered for promotion, according to Major Wille C. Jones, the City's Fed.

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3. See Record, Noyes deposition, p. 52, and Exhibit 13 to this deposition.

Appendix A

R. Civ. P. Rule 30(b) (6) designee on matters of personnel policy and procedure and then Deputy Chief of Administrative Services in charge of personnel, training, maintenance, and central records. (Jt. App. 796). The evaluations were not used to determine pay. (See Record Deposition of Wille C. Jones, p. 57, 62, 63, 64, 77). Besides this Court noted in *Hopkins, supra,* that when Hopkins' overall ratings on his evaluation remained the same, even though his supervisor wrote he needed improvement in job behavior and work relations, he did not suffer any adverse employment action. 77 F. 3d. 745 at 755. Therefore, this retaliation claim fails, as well.

Plaintiff Quinney alleged in the Amended Complaint that "he was given a negative rating on his performance valuation . . . for failure to follow the 'chain of command' ". (Jt. App. 68). However, Quinney received a total of 442.5 points on his evaluation, which gave him an above standards rating. Had he [24] received the maximum allowable points for the Personal Relations category about which he complains, his overall score would have still resulted in an "above standards" rating. (See Record, Quinney Deposition, Exhibit 3 [performance evaluation])[4]. He did not suffer any adverse employment action as a matter of law, and this retaliation claim must fail.

Plaintiff Stachura, who received an overall "above standards" rating on his evaluation, also claims the City retaliated

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4. Quinney received 3 out of 5 points for the component of Personal Relations for which he was criticized for failure to follow the chain of command. Had he received the maximum allowable 5 points for this category, his overall personal relations score would have increased from 12.6 to 13.8, which. When multiplied by 5 (see last page of evaluation) would have resulted in a total score of 448.5, which is still in the "above standards" category.

against him by including a critical comment about failure to follow the chain of command. (Jt. App. 197). This retaliation claim, like Noyes', fails because Stachura failed to show any adverse impact on his employment.

Stachura also claims retaliation because his scores in the Personal Relations category were "unsatisfactory". (Jt. App. 197). The maximum score allowable in each of the five components of the Personal Relations category is five (5) points. He was awarded five (5) points for three of these components. Had he received the maximum of five (5) points for each of the five components, his total score would have still resulted in an "above standards" rating.[5] He did not suffer any adverse employment action, and his [25] retaliation claim fails.

Plaintiff Childress claims retaliation in connection with his 1994 performance evaluation because he was given a "standard" rating and believed his rating should have been higher. He apparently contends that Carroll's comments that he "did not follow the chain of command; ignored rules and regulations and caused subordinates to do the same . . ." were undeserved. (Jt. App. 191). The City presented evidence that Childress never discussed with Carroll any problems that Carroll might have

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5. Stachura's evaluation appears in the Record as Exhibit 4 to his deposition. Scores for individual components appear on page six of his evaluation, and his overall score appears on page seven.

Receiving five points for each component would have resulted in a total score for the Personal Relations category of 15 points instead of the 11.4 he received. Multiplying these 15 points by 5 (see page 7) would have resulted in a score of 75 instead of 57 in the personal relations category, which would have increased his overall score by 18 points for a total evaluation score of 435, which is still in the "above standards" category.

created before signing on to the January 13th memorandum, that he failed to notify Hicks of any problems Carroll was creating, that he participated in another letter sent to a city councilman about superior officers, allowed subordinates to violate rules and regulations and participated with them in these violations. (See Record, Exhibit D to Defendants' Reply Brief, dated March 14, 1996). However, in response to the City's motion for summary judgment Childress offered no proof whatsoever that Carroll's comments were unjustified or that his performance justified a higher rating during this evaluation period. In short, Childress did not meet his burden of proving retaliation.

In his response to the motion for summary judgment, Childress claims that "in his 'investigation' Hicks found no negative [26] information on Childress justifying the negative performance review for Childress. (Hicks Dep. pp. 155-60)." (See Plaintiff's Response in Opposition to Defendants' Second Motion for Summary Judgment, p. 13).

First according to Hicks' Affidavit (See Record, Exhibit 6 to Defendant's Motion for Summary Judgment, p. 1), he was not aware of and did not investigate the retaliation claims of any of the plaintiffs because they did not bring them to his attention prior to going to the EEOC. Second, a careful reading of pages 155-60 of Hicks' deposition (Jt. App. 737-742) simply indicates that he had no personal knowledge of Childress' day-to-day performance, the particulars of the evaluation were left to the first-line supervisor, and he had no authority to dictate changes. (Jt. App. 740). Contrary to Childress' contention, these pages of Hicks' deposition can not reasonably be construed as a categorical admission that there was no evidence supporting Carroll's evaluation of Childress. Plaintiffs Harvey and Mease

claim retaliation because they were transferred from Second Precinct. Mease was transferred to a day shift on First Precinct (Jt. App. 676), and Harvey was transferred to Headquarters to work in the warrants and information section (Jt. App. 676) because no other sergeants positions were available at the time (See Record, Hicks Deposition, p. 33-34).

The City presented evidence that Hicks recommended their transfers because morale on the platoon had suffered greatly and because both Harvey and Mease had indicated during the [27] investigation of the January 13th memorandum that they were either afraid of or intimidated by Carroll and did not wish to continue working him. Additionally, the platoon sergeants indicated to Hicks that serious safety issues had arisen because the fallout from the January 13th episode had divided the platoon. The lieutenants and sergeants on two shifts had indicated to Hicks that some day shift officers were no longer backing each other up, that some officers remained out of service longer than they should while others answered calls alone, that some officers openly expressed negative feelings toward others vis-a-vis signing the January 13th memorandum, and the precinct lieutenants had become concerned that an officer might get injured as a result. (Jt. App. 216). Obviously, these were serious problems reflecting legitimate concerns which the City was required to resolve.

Hicks considered the foregoing problems resolved by the transfer of Harvey and Mease because no subsequent problems of this nature came to his attention after the transfers. (Jt. App. 673). There is absolutely no evidence in this record to suggest that these were no legitimate business concerns the City needed to address. It was incumbent upon Harvey and Mease to produce evidence indicating otherwise, or that the problems were not

resolved by their transfers. They failed to do either, and the record before this Court indicates that they were transferred for legitimate, non-pretextual reasons. The retaliation claims of Mease and Harvey, therefore, must fail.

All plaintiffs maintained their ranks, received the same pay,

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